EDITOR'S NOTE

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No. 95-6016

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1994

LEM DAVIS TUGGLE, JR.,

Petitioner,

vs.

J. D. NETHERLAND, WARDEN

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY BRIEF

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On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF

In reply to Respondent's Brief in Opposition[1], the Petitioner first offers the Commonwealth's own, earlier, words:

AKE v. OKLAHOMA REQUIRES THAT THE

[1]Petitioner does not concede that the points raised in Respondent's Brief in Opposition which are not expressly addressed in this Reply are properly raised at this juncture. Due to the exigencies inherent in the State's scheduled execution, Petitioner here responds only to the primary argument pressed by the Commonwealth.

DEFENDANT'S CASE BE REMANDED TO THE
CIRCUIT COURT OF SMYTH COUNTY FOR RESENTENCING

. . .

Because the Commonwealth introduced psychiatric testimony that the defendant presented a future danger, and because the defendant was not provided with an independent psychiatrist to attempt to rebut the testimony, the defendant's case would appear to be within the line of cases in which Ake mandates the appointment of an independent psychiatrist to assist the defendant in preparing for the sentencing phases of his trial. Accordingly, the Commonwealth submits that the defendant's case should be remanded to the Circuit Court of Smyth County for resentencing by a different jury.

. . .

The Commonwealth submits . . . under Ake v. Oklahoma, that the defendant should be resentenced . . . .

Brief on Behalf of the Commonwealth at 20-23. Tuggle v. Commonwealth, (Record No. 840486)(attached hereto).

This forthright, decade old, position of the Commonwealth sharply contrasts with its position in its Brief in Opposition. Today Respondent argues that there was no Ake violation in Petitioner's case,[2] and also, if there was, that Petitioner's unconstitutional death sentence did not "compel" relief for Petitioner before the Virginia Supreme Court. If, in the Respondent's 1986 words, there was an Ake violation and, "accordingly," and "because" of that violation, the Petitioner "should" be resentenced "because" relief was "REQUIRE(D)," Id., then Respondent's 1995 argument that the error was "harmless" and resentencing was not "compelled" rings

[2]In the Commonwealth's current words, the Ake violation it was compelled to recognize in 1986 is, today, "simply non-existent." Brief in Opposition, p. 11.

hollow.

Plainly, there was a violation of Ake. Tuggle was committed by the trial court to Central State Hospital to be evaluated pursuant to Va. Code Sec. 19.2-169.1 and 169.5. Those statutes allowed investigation to determine his competence to stand trial and his sanity at the time of the offense. Under Virginia law, nothing said by a defendant during such an evaluation can be introduced against the defendant "as evidence or as a basis for evidence" unless he puts his mental status at the time of the offense in issue. Va. Code Sec. 19.2-169.7.

Shortly before trial, the state examiners wrote to the Court indicating that they had completed the ordered investigation. The letter also stated that "[w]e have formed an opinion as to the issue of future dangerousness but we are not reporting it to the Court at this time because we were not requested to do so." App. 39.

After receiving this letter, Tuggle's counsel moved for the appointment of a defense psychiatrist. The motion, made because of the "seriousness of the charges heretofore lodged against the defendant," stated its purpose plainly:

> The undersigned have made arrangements with Dr. C. Robert Showalter, Blueridge Hospital, Box 100, Charlottesville, Virginia, to perform an evaluation and make unto the attorneys for the Defendant a report on the condition of the Defendant at the time of the alleged offenses herein and at the present time with regard to his capacity to understand the proceedings against him, and to assist in the defense of his trial.

App. 41. At oral argument on the motion, Tuggle's counsel indicated that they would pay for the examination on their own because of the Court's previous refusal to appoint any independent experts. App. 62. The trial court denied the motion. At trial, the state's "future dangerousness" evidence was introduced and argued vigorously by the prosecutor while Tuggle

was deprived of a response. App. 185-207, 220, 222-24

The motion clearly sought independent psychiatric assistance "to assist in the defense of [Tuggle's] trial." The Commonwealth argues now that asking directly for that assistance, and volunteering to pay for it, was not enough. According to the Commonwealth, while the defense asked for assistance at "trial," its failure to say "sentencing" or mention "future dangerousness" was a fatal error. The constitutional right announced in Ake v. Oklahoma is not so inconsequential as to evaporate over the minor wording difference pressed by the Commonwealth.

Finally, the Commonwealth asserts that Tuggle has not proffered any response to the State's psychiatric sentencing testimony. That, of course, is the proof of, not a defense to, the Ake violation. Accordingly, "Ake does not require a particular showing of prejudice . . . ." Buttrum v. Black, supra, 721 F. Supp. 1269, 1313 (N.D. Ga. 1989).[3] Furthermore, Tuggle's state and federal petitions asserted aspects of his mental history that would have been relevant to a properly appointed independent expert. The state habeas court dismissed Tuggle's petition without allowing the evidentiary hearing he requested and the District Court granted him habeas relief prior to ruling on his motion for an evidentiary hearing.

[3]The district court's opinion in Buttrum was described as "a very detailed and scholarly order," Buttrum v. Black, 908 F.2d 695 (11th Cir. 1990), and was affirmed and adopted by the United States Court of Appeals for the Eleventh Circuit. The Commonwealth belittles the significance of Buttrum because it is "merely a one-paragraph, per curiam opinion," Brief in Opposition at 14, but the one paragraph plainly makes the district court opinion Eleventh Circuit law.

Respectfully Submitted,

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